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SUPREME COURT, U.S.

No. 80-6709

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LEONARD DURAN ENRIQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a conviction for engaging in a continuing criminal enterprise may rest in part on a series of illegal telephone conversations evidencing continuing narcotics violations.

2. Whether the affidavits supporting the applications for electronic surveillance sufficiently particularized why normal investigative techniques would be inadequate.

3. Whether the court erred in denying petitioner an evidentiary hearing to challenge the truthfulness of the electronic surveillance affidavits.

4. Whether the government's subpoena of telephone records prior to seeking a warrant for electronic surveillance tainted the subsequent surveillance.

5. Whether the sealing procedures for the original recordings and the use of duplicate-original recordings were proper.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1981. Petitions for rehearing were denied on May 4, 1981. The petition for a writ of certiorari was filed on May 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, engaging in a continuing criminal enterprise, in

violation of 21 U.S.C. 848, and 11 counts of using a telephone in furtherance of the narcotics conspiracy, in violation of 21 U.S.C. 843(b). He was sentenced to 30 years' imprisonment, to be followed by a lifetime special parole. He was also sentenced to a concurrent term of imprisonment totaling 33 years on the telephone counts and fined $25,000. 1/ The court of appeals affirmed.

1. On March 21, 1978, the district court ordered the interception for 20 days of telephone calls over a telephone listed to Arnold Enriquez, petitioner's older brother. A second order continuing the interception was entered on April 13, 1978. Overheard conversations indicated that Arnold Enriquez was obtaining cocaine from petitioner and petitioner's friend, Jacob Lange, and that petitioner's possible sources were an individual in Miami and another individual known only as "Oklahoma Bob." On May 2, 1978, the court authorized the interception of communications over petitioner's telephone in an effort to locate and identify these sources of cocaine.

2. The evidence at trial was primarily gained from these interceptions and related surveillance. 2/ Briefly, it showed the existence of a conspiracy to distribute

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1/ Petitioner was not sentenced on the conspiracy count, the court noting that it was a lesser included offense of the continuing criminal enterprise count (Judgment and Commitment Order).

2/ Pre-trial motions to suppress evidence obtained through the interceptions were denied. (Feb. 15, 1979 Order. A copy of this order has been lodged with the Clerk of this Court.)

cocaine that reached from Miami, Florida to Phoenix, Arizona and Las Vegas, Nevada. Co-defendant Barry Hoffman, a source of supply, sold cocaine on two occasions in late March and April 1978 to petitioner and Lange. They or an associate brought the narcotics to Phoenix or Las Vegas, where petitioner sold the drugs in large quantities to distributors. In May 1978, petitioner and Lange flew to Miami to purchase cocaine again. At that time they noticed that they were being followed, and decided not to continue with their plans. When they returned to Phoenix, however, a search warrant was executed upon their luggage, uncovering a large quantity of a substance known to be used to "cut" or dilute cocaine and approximately $77,000 in cash. Other warrants executed that night at petitioner's and Lange's residences uncovered, among other things, a strainer bearing traces of cocaine, as well as quaalude tablets and marijuana.

ARGUMENT

1. Petitioner contends (Pet. 12-18) that his repeated use of the telephone in violation of 21 U.S.C. 843 cannot support his conviction for engaging in a continuing criminal

enterprise, in violation of 21 U.S.C. 848. 3/ This claim lacks merit.

Count 3 of the indictment charged petitioner with violating 21 U.S.C. 848 by engaging in a continuing criminal enterprise "in that he violated Title 21, U.S.C., Sections 841(a)(1) & (b), 843(b), & 846, which violations were part of a continuing series of violations of such statutes * * *." The court instructed the jury at length on section

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3/ 21 U.S.C. 848 reads, in pertinent part (emphasis added):

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

* * * * *

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

848. 4/ The court noted that "five essential elements are required to be proved, beyond a reasonable doubt, in order to establish" an offense under 28 U.S.C. 848: first, that petitioner committed at least one of the charged substantive 21 U.S.C. 843 offenses; second, that such violation was part of a continuing series of federal narcotics violations; third, that petitioner undertook to commit such offenses in concert with five or more persons; fourth, that petitioner occupied an organizational or supervisory position over such persons; and fifth, that petitioner obtained substantial income or resources from the continuing series of violations (Tr. 42: 255-256). In sum, the jury was properly instructed to find that petitioner violated 21 U.S.C. 848 only if it first found that he was guilty of a predicate narcotics felony, and that such felony constituted part of a continuing pattern of narcotics activity.

Thus, petitioner's claim that he was convicted of a continuing criminal enterprise based solely on 11 discrete statutory violations is incorrect. Rather, the jury found that he unlawfully used the telephone and that the evidence as a whole showed a continuing series of narcotics offenses. Beyond comprising violations themselves, the proven telephone violations provided evidence of a continuing series of illegal activities including purchase,

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4/ The court also instructed the jury on the statute proscribing possession with intent to distribute, 21 U.S.C. 841, reading the statute and defining all terms (Tr. 42:241, 249-253).

distribution, and conspiracy offenses that violated the charged narcotics laws. 5/ For example, petitioner was overheard saying that he had "been doing it for 10 years," in a context obviously referring to the sale of narcotics (Call Exh. 218). Petitioner instructed an associate on how to conduct a cocaine transaction safely in another call (Call Exh. 251). In yet another conversation petitioner discussed cutting techniques with his brother (Call Exh. 231); he later spoke with him about selling a "whole bunch more cocaine" (Call Exh. 253). Petitioner discussed in another recorded telephone conversation the relative merits of yellow and white cocaine (Call Exh. 263), and petitioner and his brother also talked generally about profit margins, the manner of dealing, and costs of operating an illicit drug business (Call Exh. 305). Thus, the tapes of the telephone coversations themselves establish a continuing series of narcotics conspiracy and distribution violations. Petitioner's suggestion, therefore, that three related telephone calls could impermissibly subject the caller to mandatory 10 years' imprisonment (Pet. 13-16) has no application to the facts of this case. 6/

5/ To the extent that the instructions failed to point in particular to the narcotics activity underlying his telephone counts, petitioner explicitly requested that limitation (Tr. 38:142-143) and cannot now complain that his request was honored.

6/ It is axiomatic that a statute whose constitutionality might be questioned in marginal fact situations may not be challenged on that ground if it is clearly constitutional as applied. United States v. Powell, 423 U.S. 87, 93 (1975); United States v. Mazurie, 419 U.S. 544, 550 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973).

Petitioner also suggests (Pet. 17) that by relying on telephone calls the government failed to prove that he obtained substantial income from his continuing series of narcotics violations. However, the intercepted telephone calls, briefly noted above, revealed petitioner's purchase of large amounts of cocaine, which he would distribute through his network. The recordings also indicated the profits realized by petitioner's narcotics activity (Call Exh. 305, 223), and constituted evidence from which the jury could reasonably conclude that he derived substantial income from the illegal enterprise.

2. Petitioner claims (Pet. 21-36) that the affidavits supporting the applications for electronic surveillance failed to particularize how normal investigative techniques had failed or would be unsuccessful. To the contrary, as the courts below found (Pet. App. 2; Feb. 15, 1979 Order 4-6), the affidavits related in detail the shortcomings of normal investigative techniques in this case. In particular, they told of attempted undercover penetration (Pet. App. 22, 33-34, 38, 56), inconclusive surveillance (Pet. App. 34), informants who were unwilling to testify at trial (Pet. App. 19-20), and information revealed from toll records and pen registers (Pet. 26-28, 30-33, 73-74). 7/ In

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7/ Petitioner argues (Pet. 29) that because an undercover agent succeeded in purchasing narcotics from his brother and surveillance agents saw particular vehicles at his brother's house, those techniques were in fact successful. However, these "successes" were so limited and so unpromising of future progress that they compellingly demonstrated the limitations of (continued)

addition, the affidavits show federal agents considered and rejected face-to-face interrogation of suspects and a grand jury investigation because of the refusal of knowledgable persons to testify and the likelihood that these investigations would alert the targets prematurely (Pet. App. 35-39, 57, 76), especially because certain of the suspects had faced or were currently facing other criminal charges and thus had both the knowledge and the incentive to avoid detection (Pet. App. 25-26, 28-29, 34, 56, 75). Agents had utilized previously at least one search warrant without extensive success, and they believed other search warrants would also have limited results (Pet. App. 56). The affidavits thus set forth in great detail the reasons why electronic surveillance was necessary and proper in this particular case. 8/

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traditional techniques. United States v. Martinez, 588 F.2d 1227, 1232 (9th Cir. 1978). Purchases of narcotics from petitioner's brother would never reveal petitioner's sources for those narcotics, and physical surveillance was of diminishing success because the suspects spotted their followers and took pains to avoid them (Pet. App. 55-57, 74-75). Surveillance, furthermore, could not uncover the details of relationships or conversations (Pet. App. 34-35).

8/ Petitioner argues that other techniques, which were not tried because of their minimal potential for success, should have been utilized, but "the purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." United States v. Pacheco, 489 F.2d 554, 565 (5th Cir. 1974), cert. denied, 421 U.S. 929 (1975). See also United States v. Baker, 589 F.2d 1008, 1013 (9th Cir. 1979); United States v. Vento, 533 F.2d 838, 849-850 (3d Cir. 1976).

3. Petitioner further alleges (Pet. 37-38) that the court erred in denying him a hearing to challenge the truthfulness of certain statements within the affidavits. Petitioner challenged the affidavits prior to trial, claiming they contained reckless misstatements and deliberate falsities. He also filed a three-page affidavit in effect denying certain of the statements (Pet. App. 81-83). The district court found that petitioner's personal denials presented an insufficient basis for a hearing, but gave petitioner an opportunity to offer further proof sufficient to overcome the presumed validity of the affidavits. After petitioner failed to present further evidence beyond DEA reports that were already part of the record, the court found that the affidavits, DEA reports, and offers of proof were insufficient to require a hearing (Feb. 15, 1979 Order 7-13). The court of appeals also rejected petitioner's claim that a hearing was required (Pet. App. 2-3).

The district court's denial of a hearing on the affidavits, and the court of appeals' affirmance of the lower court's ruling, fully satisfy the standards set forth in Franks v. Delaware, 438 U.S. 154 (1978). Petitioner challenged the accuracy of only a few representations in the three affidavits. He failed to demonstrate, however, that the allegedly inaccurate information was not "believed or appropriately accepted by the affiant as true" (id. at 165), the standard for determining recklessness or deliberate

falsification. 9/ And, even assuming that petitioner's contrary allegations demonstrated the falsity of the challenged statements, the remaining portions of the affidavits supported a finding that normal investigative techniques would be unsuccessful; thus, no hearing would have been necessary in any event (id. at 172).

4. Petitioner additionally claims (Pet. 38-40) that the administrative subpoena of certain telephone records prior to obtaining warrants for wire interception tainted the subsequent warrants. After a lengthy hearing the district court correctly rejected this contention, in a well-reasoned opinion. (June 20, 1979 Order. A copy of this order has been lodged with the Clerk of this Court.) In particular, the district court rejected the argument that an administrative subpoena for "cable and pair" information, which relates to the wires serving a particular telephone number, is insufficient under the federal electronic surveillance statute, 18 U.S.C. 2510 et seq. The court further found that petitioner had no privacy right in the telephone company's business records, and concluded that obtaining "cable and pair" information prior to obtaining a court order does not violate 18 U.S.C. 2510 et seq.

9/ As the Ninth Circuit has recognized, efforts to synthesize or summarize a substantial amount of information necessarily involve "omission and an element of distortion, but that fact alone does not establish either deliberate falsehood or reckless disregard for the truth." United States v. Young Buffalo, 591 F.2d 506, 510-511 (9th Cir.), cert. denied, 441 U.S. 950 (1979).

inasmuch as the information is not an intercepted 10/ wire or oral communication (June 20, 1979 Order 4-6.). 11/

5. Petitioner finally alleges (Pet. 38-42) that the composite tapes were inaccurate and not properly sealed. This claim lacks merit.

The tapes at issue here consist of "original" recordings and contemporaneously made "duplicate-original" recordings. The originals were immediately placed in heat-sealed envelopes and were available to the defense for comparison. 12/ The duplicate originals were used to prepare composite tapes that were played to the jury. No evidence was presented to substantiate petitioner's claim that the composite tapes were altered, and petitioner apparently declined to request comparisons with the heat-

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10/ The court noted that "cable and pair" information is not acquired "aurally", so it is not within the statutory definition of "intercept," 18 U.S.C. 2510(4), nor is it acquired by the use of any electronic, mechanical, or other device within the meaning of the statute (June 20, 1979 Order 5).

11/ Indeed, petitioner implicitly concedes this very point when he argues that the obtaining of telephone records and pen register information before the interception was a legitimate investigative effort making resort to electronic surveillance unnecessary (see Pet. 29).

12/ Petitioner claims that the original tapes were not sealed "under the direction of the judge" (Pet. 41) (emphasis in original). The district court, however, specifically found that the "DEA agents participating in this case at all times maintained proper custody and control of the original tape recordings in accordance with the orders of the Honorable Wm. P. Copple, U.S. District Judge, District of Arizona, and of the duplicate original tape recordings from which the composite tape * * * was made" (June 20, 1979 Order 3)(emphasis added). The court further found that, as of June 20, 1979, the original tapes were "still under court seal" (id. at 7)(emphasis added).

sealed originals that would substantiate his claim. Thus, both courts below were correct in approving these procedures (Pet. App. 3; June 20, 1979 Order 7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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